Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ANNEMARIE BOTHE, PETITIONER

v.

PAMELA JEAN HANSEN

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Florida's intermediate appellate courts decide over 80% of the appeals they hear with *per curiam* orders issued without opinions and the losing party has no right to seek further review of these summary dispositions by the Florida Supreme Court. Does this procedure deny the losing party due process or the equal protection of the laws?

2. Is an appellant denied procedural due process when Florida's Second District Court of Appeal, a court of last resort, refuses to include in the record and consider evidence relevant to the her claim of error by the lower court?

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RELEVANT PROVISIONS

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OPINIONS BELOW

The marriage settlement agreement between respondent and the decedent in the divorce case of *Andreas David Bothe v. Pamela Jean Bothe* (Docket No. 2006-DR-1548 SC), dated February 21, 2006, is set forth in the Appendix hereto(App. 1-6).

The final judgment of simplified dissolution of marriage in the divorce case of *Andreas David Bothe v. Pamela Jean Bothe* (Docket No. 2006-DR-1548 SC), dated February March 15, 2006, is set forth in the Appendix hereto(App. 7-8).

The decedent's IRA Application and Adoption Agreement, signed and dated October 5, 1998, is set forth in the Appendix hereto(App. 9-12).

A letter dated September 2002 from Donaldson, Lufkin & Jenrette (Harris*direct*) to the decedent Andreas David Bothe, is set forth in the Appendix hereto(App. 13-14).

The unwitnessed last will and testament of the decedent Andreas David Bothe, dated March 21, 2006, is set forth in the Appendix hereto(App. 15-16).

Letter of the decedent Andreas David Bothe, dated March 21, 2006, is set forth in the Appendix hereto(App. 17-18).

The unpublished *per curiam* Order of the Florida District Court of Appeal for the Second District in *Annemarie Bothe v. Pamela Jean Hansen*(Docket No. 2D08-557), filed on November 7, 2008, and reported

at 996 So.2d 860(Fla.2d DCA 2008), affirming the final summary judgment in respondent's favor and against petitioner by the Circuit Court for Sarasota County, is set forth in the Appendix hereto(App. 19).

The unpublished and unreported Order of the Florida District Court of Appeal for the Second District in *Annemarie Bothe v. Pamela Jean Hansen*(Docket No. 2D08-557), filed on May 8, 2008, denying petitioner's motion to supplement the record , is set forth in the Appendix hereto(App. 20).

The unpublished and unreported Final Summary Judgment of the Circuit Court for Sarasota County in *Pamela Jean Hansen v. E*Trade Financial Corp. and Annemarie Bothe*(Docket No. 2006 CA 4875 SC), decided February 1, 2008, determining that respondent is entitled to all the proceeds of the decedent's IRA account and that petitioner is entitled to nothing, is set forth in the Appendix hereto(App. 21-23).

The unpublished and unreported Order of the Florida District Court of Appeal for the Second District in *Annemarie Bothe v. Pamela Jean Hansen*(Docket No. 2D08-557), filed on December 31, 2008, denying petitioner's motion for rehearing, for rehearing *en banc* or for a written opinion, is set forth in the Appendix hereto(App. 24).

JURISDICTION

The decision of the Florida District Court of Appeal for the Second District was decided and filed on November 7, 2008(App. 1). Because the Florida District Court of Appeal for the Second District elected not to

write an opinion, the Supreme Court of Florida was without jurisdiction to review this case and the Florida District Court of Appeal for the Second District is therefore the highest State court in which a decision could be had. Fla. Const. Art. V, § 3(b)(3). See *Palmore v. Sidoti,* 466 U.S. 429, 431(1984); *Williams v. Florida,* 399 U.S. 78, 80 n. 5(1970); *Jenkins v. Florida,* 385 So.2d 1356, 1359-1360(Fla.1980).

On December 31, 2008, the Florida District Court of Appeal for the Second District denied petitioner's motion for rehearing, for rehearing *en banc* or for a written opinion(App.).

On March 23, 2009, this Court, Thomas, J., granted petitioner's application for an extension of time to file their petition until May 30, 2009(Docket No. 08A-835).

This petition for writ of certiorari is filed within the time allowed by Justice Thomas' order allowing petitioners to file their petition by May 30, 2009. Supreme Court Rule 30.1.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article IV, § 2:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

United States Constitution, Article VI, Paragraph 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment I:

> Congress shall make no law...abridging...the right of the people...to petition the government for the redress of grievances.

United States Constitution, Amendment XIV, § 1:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or

laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Fla. Const. Art. V, § 3(b)(3):

The supreme court of Florida may review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

Fla. App. Rule 9.200(f):

Correcting and Supplementing Record.
(1) If there is an error or omission in the record, the parties by stipulation, the lower tribunal before the record is transmitted, or the court may correct the record.
(2) If the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record.
No proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given.

STATEMENT

On October 5, 1998, while he was married to the respondent Pamela Jena Hansen ("the respondent"), the decedent Andreas David Bothe ("the decedent") of Nokomis, Florida, opened an IRA plan with Donaldson, Lufkin & Jenrette Securities Corporation, called a DLJ*direct* account (App. 9-12). He designated his wife, the respondent Pamela Jean Hansen ("the respondent") who was then named Pamela Jean Bothe, as the primary beneficiary of the plan to receive 100% of its benefits; and he named his sister, the petitioner Annemarie Bothe ("petitioner") as the plan's only contingent beneficiary(App. 9-10).

In September of 2002, Donaldson, Lufkin & Jenrette Securities Corporation wrote decedent to tell him that on November 1, 2002, it would no longer be the custodian of his IRA account and that Harris Investor Services LLC ("Harris*direct*") would take over as custodian at that time(App. 13-14). In order to complete this change, the Internal Revenue Service required decedent to enter into a formal agreement adopting Harris*direct* as the plan's new custodian(App. 13). As the letter explained, if he did not return signed documents agreeing to the change, DLJ*direct* could close the account and distribute the assets, subjecting him to income and penalty taxes arising from the distribution; or he could roll the assets of the plan into an entirely new IRA within sixty (60) days(App. 13-14).

There is nothing in this record to show that the decedent ever complied with this request by Donaldson, Lufkin & Jenrette Securities Corporation to change custodial responsibility for his IRA plan from

DLJ*direct* to Harris*direct*. Harris*direct* eventually merged with E*Trade in 2006 and there is nothing in the record which reflects the terms and conditions of these mergers from DLJ*direct* to Harris*direct* in 2002 and then from Harris*direct* to E*Trade in 2006 and whether the terms of the decedent's original 1998 IRA contract ever survived these two mergers. Nor was there any evidence that the decedent received any notice of E*Trade's requirements for changing beneficiaries of his IRA plan at any time.

In anticipation of divorce proceedings between him and respondent, the decedent moved out of the marital home in August of 2005. After divorce proceedings ensued in 2006, he and respondent entered into a marital settlement agreement ("the MSA") dated February 21, 2006, and signed by both parties(App. 1-6). The MSA gave each party equal shares of the marital estate(App. 3-5). In order to equalize the proportions, respondent was awarded certain certificates of deposit while the decedent was given $1,089,546.00 of his IRA *as his own*(App. 2-4).

Furthermore, it was provided in the MSA—signed and sworn by respondent Wife as well as by the decedent---that she "shall have no further rights or responsibilities regarding these assets" of the decedent which were awarded him under the MSA, thereby waiving any expectancy on her part to receive the IRA benefits or anything else belonging to the decedent in the wake of the MSA and their divorce (App. 3;6).The MSA was incorporated by reference within a final judgment of the dissolution of the parties' marriage which entered in the Circuit Court for Sarasota County on March 15, 2006(App. 7-8).

On March 21, 2006, the decedent executed an unwitnessed holographic will which, among other bequests, gave all of his IRA benefits to one Margaret Lindsay (whom he intended to marry) and to petitioner he gifted the proceeds from his stock account and "all other items owned by [him] individually"(App. 15-16). On March 22, 2006, suffering from chronic depression, the decedent took his own life(App. 17-18;21). In a final letter to Ms. Lindsay, he again indicated that he wanted her to receive the money from his retirement plan(App. 17-18).

Upon the parties' divorce, respondent changed her name from Pamela Jean Bothe to Pamela Jean Hansen(App. 8). Following the decedent's death one week later, she was appointed the decedent's personal representative and demanded payment from E*Trade of the proceeds of the decedent's IRA plan ($1,089,546.00) claiming that she was entitled to same as the primary beneficiary under the 1998 contract which the decedent entered into when he set up the IRA with Donaldson, Lufkin & Jenrette Securities Corporation, the DLJ*direct* account, and named her primary beneficiary thereunder(App. 21-22).

E*Trade refused to pay respondent the proceeds of decedent's IRA. In addition, petitioner contended that the MSA executed by the decedent and respondent as part of their divorce controlled the disposition of the decedent's IRA proceeds and under its plain terms, respondent had *no* claim to the IRA, had already received everything she was entitled to from the decedent as part of their divorce and, in any event, she had expressly waived any expectancy on her part to receive these IRA benefits or anything else

belonging to the decedent in the wake of the MSA and the divorce.

Respondent then brought this civil action in the Circuit Court for Sarasota County against petitioner and E*Trade seeking declaratory relief that as the named primary beneficiary of the decedent's IRA, she was entitled to its proceeds(App. 21-22). Petitioner counterclaimed by seeking a declaration that the MSA controlled the disposition of the decedent's IRA proceeds and under its plain terms respondent had no claim to the IRA, had already received everything she was entitled to from the decedent as part of their divorce and, in any event, she had expressly waived any expectancy on her part to receive the IRA benefits or anything else belonging to the decedent in the aftermath of their divorce(App. 21-22). Petitioner sought an order awarding the IRA proceeds either to her or to Margaret Lindsay whom the decedent intended to marry and to whom he attempted to give his IRA proceeds just before his death.

Respondent's motion for summary judgment and petitioner's opposition thereto was argued before the Circuit Judge on January 29, 2008(App. 21-22). At the hearing, respondent adduced *no* evidence to show the terms of the two mergers of decedent's IRA plan from DLJ*direct* to Harris*direct* in 2002 and then from Harris*direct* to E*Trade in 2006 and whether the terms of the decedent's original 1998 IRA contract survived these two mergers. Nor did respondent show that the decedent received any notice of E*Trade's requirements for changing beneficiaries of his IRA plan at any time before signing the MSA in February of 2006, or obtaining their divorce on March 15, 2006. All

that was shown was that in anticipation of divorce proceedings between him and respondent, the decedent in August of 2005 moved out of the marital home, the address to which E*Trade would have sent any of its requirements for changing the beneficiaries of decedent's IRA plan.

Petitioner argued that these facts----and respondent's notable *absence of proof* on these crucial issues----showed that genuine triable fact issues existed about whether decedent's IRA plan together with its beneficiary designation survived the 2002 and 2006 mergers intact; whether decedent's failure to comply with Harris*direct* letter of 2002 requesting his express agreement to the merger with Harris*direct* revoked his IRA plan and its beneficiary designation or caused it to lapse or to be revoked; whether the decedent intended that respondent be the primary beneficiary of his IRA plan after their execution of the MSA and their ensuing divorce; and whether the express terms of the MSA giving decedent unfettered ownership over the proceeds of his IRA and containing respondent's express waiver of any claim to these proceeds overrode the obsolete beneficiary designation of the IRA itself.

Immediately after oral argument on her motion for summary judgment, respondent introduced into the record a reference as a trial exhibit to the Harris*direct* letter of 2002 to decedent requesting his express assent to a "new adoption agreement;" but she failed to produce any evidence that decedent ever executed the paperwork agreeing to this new merger with Harris*direct* such as by signing a new adoption agreement.

On February 1, 2008, the Circuit Judge issued his decision granting respondent's motion for summary judgment, ruling that she was "entitled to all proceeds of the decedent's E*Trade IRA account...;" he denied petitioner any relief on her counterclaim(App. 21-23). In his decision, the trial judge erroneously characterized petitioner as decedent's "personal representative" which she was not(App. 23). Moreover, without any basis in fact and contrary to the plain terms of the MSA itself, it found that the MSA identified the decedent's IRA plan as an account with E*Trade and "[t]herefore, it is clear that the decedent was aware that his IRA account was held by E*Trade at the time the decedent and [respondent] were divorced"(App. 21-22). *The MSA made no reference to any such E*Trade account and there was no evidence that decedent knew that his 1998 adoption agreement was accepted by E*Trade or that he knew of E*Trade's regulations for IRAs at the time of the divorce.*

In addition, the Circuit Judge built upon this erroneous finding of fact about the decedent's knowledge of E*Trade as the custodian of his IRA plan by ruling that since the decedent failed to comply with E*Trade's strict requirements for changing beneficiaries during his lifetime, he must have intended for respondent to remain the primary beneficiary under the plan and she was therefore entitled to its proceeds(App. 22).

On March 27, 2008, E*Trade was dismissed as a party by stipulation. Petitioner then appealed the Circuit Judge's ruling to the District Court of Appeal for the Second District (App. 19). Incident thereto, petitioner moved in the appellate court to supplement

the record to include the September 2002 letter from Harris*direct* to the decedent(App. 20). Petitioner claimed that the appellate court needed to consider whether this document, introduced into the record by respondent after oral argument on her summary judgment motion, raised genuine issues of material fact for trial, i.e., whether decedent's failure to comply with Harris*direct* letter of 2002 requesting his express agreement to the merger with Harris*direct* revoked his IRA plan and its beneficiary designation altogether or caused it to lapse or to become otherwise adeemed; and whether combined with the MSA and the decedent's other written expressions of intent about his IRA proceeds before he died, this letter undermines any argument that the decedent intended for respondent to have any of his IRA proceeds(App. 20).

On May 8, 2008, the District Court of Appeal for the Second District denied petitioner's motion to supplement the record on appeal(App. 20). On November 7, 2008, the same court issued a one-page *per curiam* affirmance of the judgment below without issuing any opinion explaining its rationale(App. 19).

Petitioner moved for rehearing, rehearing *en banc* and requested a written opinion(App. 24). She argued *inter alia* that the appellate court should have allowed her to supplement the record on appeal with the September 2002 letter from Harris*direct* to the decedent because respondent never proved that decedent complied with any new IRA requirements in 2002 after the first merger or in 2006, after the second merger. As she contended, "no 'new adoption agreement' was produced by [respondent] establishing that her claim to the IRA was legally enforceable in the

chain of events from 1998 to [the] date of decedent's death;...[and] "[w]ithout a Harris*direct* 'new adoption agreement' in 2002, there is no evidence linking the enforceability of the DLJ*direct* document on its face against E*Trade as custodian."

On December 31, 2008, the Florida District Court of Appeal for the Second District denied petitioner's motion for rehearing, for rehearing *en banc* or for a written opinion(App. 24). Because the Florida District Court of Appeal for the Second District elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review this case (Fla. Const. Art. V, § 3(b)(3)), leaving the decision of the Florida District Court of Appeal for the Second District as one made by the highest State court in which a decision could be had. See 28 U.S.C. § 1257(a).

On March 23, 2009, this Court, Thomas, J., granted petitioner's application for an extension of time to file their petition until May 30, 2009(Docket No. 08A-835).

REASONS FOR GRANTING THE PETITION

1. Florida's Second District Court of Appeal Denied Petitioner Procedural Due Process When As a Court of Last Resort It Refused to Include in the Appellate Record and Consider Evidence Relevant to Her Claim of Error.

The thrust of petitioner's argument in the Circuit Court for Sarasota County before Judge Bennett was that respondent's proof in support of summary judgment was insufficient as a matter of law

to establish her right to the decedent's IRA proceeds. At the very least and construed in the light most favorable to petitioner, the opposing party, respondent's meager proof about her entitlement to these monies showed that triable fact issues existed whether decedent's IRA plan together with its beneficiary designation survived the merger of DLJ*direct* with Harris*direct* in 2002 and Harris*direct*'s later merger with E*Trade in 2006. The record also raised the crucial fact question whether the decedent had effectively maintained his IRA plan and its beneficiary designation in consonance with the changing requirements which these new custodians (and the IRS) would have imposed upon him in order to avoid a distribution.

The other material fact questions left unresolved by respondent's proof below were whether the decedent intended that respondent be the primary beneficiary of his IRA plan after their execution of the MSA and their divorce; and whether the express terms of the MSA giving decedent unfettered ownership over the proceeds of his IRA and containing respondent's express waiver of any claim to these proceeds overrode the obsolete beneficiary designation of the IRA itself.

When respondent immediately after oral argument on the summary judgment motion in circuit court introduced into the record a reference as a trial exhibit to the Harris*direct* letter of September 2002 to decedent requesting his express assent to a "new adoption agreement" *without any proof that the decedent had actually complied with its requirements*, another genuine issue of material fact emerged for resolution, i.e., whether the decedent's failure to

comply with Harris*direct* letter of 2002 requesting his express assent to the merger with Harris*direct* revoked his IRA plan and its beneficiary designation or caused it to lapse or to be revoked. In this regard as well, respondent failed to adduce any proof in the circuit court that decedent had ever executed the necessary paperwork for agreeing to this new merger with Harris*direct*.

In the wake of the circuit court's decision granting summary judgment to the respondent, a decision founded on its fundamental misconception that the decedent "was aware that his IRA account was held by E*Trade at the time the decedent and [respondent] were divorced"(App. 21-22), when there was *no evidence* to show that decedent knew that his IRA plan had been accepted by E*Trade or that he knew of E*Trade's regulations for IRAs at the time of the divorce, petitioner sought to supplement the record on appeal to include Harris*direct's* letter of September 2002 (App.13-14;20).

This letter of September 2002 raised genuine issues of material fact whether the decedent had assented to the successive mergers of his IRA plan to the one administered by E*Trade, so that it and its beneficiary designation survived these mergers; whether the decedent's failure to comply with Harris*direct* letter of 2002 requesting his written assent to the merger with Harris*direct* revoked his IRA plan and its beneficiary designation altogether or caused it to lapse; and whether combined with the MSA and the decedent's other written expressions of intent about his IRA proceeds before he died, this letter undermines respondent's argument that the decedent

intended for her to receive his IRA proceeds(App. 20).

After the District Court of Appeal for the Second District denied petitioner's motion to supplement the record on appeal and then issued its one-page *per curiam* affirmance of the judgment without issuing any opinion explaining its rationale(App. 19;20), petitioner moved for rehearing, rehearing *en banc* and requested a written opinion(App. 24). She argued once again that the appellate court should have allowed her to supplement the record on appeal with the September 2002 letter from Harris*direct* to the decedent because respondent never proved that decedent complied with any new IRA requirements in 2002 after the first merger or in 2006, after the second merger. The District Court of Appeal denied petitioner's motion without opinion(App. 24).

This refusal by the District Court of Appeal for the Second District, a court of last resort, to include in the appellate record and accommodate in its decision this letter by Harris*direct* to the decedent of September 2002, a letter respondent herself introduced into the record below, denied petitioner procedural due process. It unfairly constricted crucial evidence helpful to petitioner's cause and irremediably prejudiced her in the marshaling of further evidence and in obtaining a fair, meaningful hearing on appeal. Without this evidence in the record, respondent was never put to the burden of showing how the decedent had actually assented to DLJ*direct's* merger with Harris*direct* in 2002 and then with Harris*direct*'s merger with E*Trade in 2006 so as to entitle her to the IRA's proceeds as its primary beneficiary. This letter was critical to

petitioner's argument that respondent had proved *no* chain of events entitling her to the decedent's IRA proceeds and the refusal of the appellate court to supplement the record to include this document denied petitioner the fair process due her on this appeal.

Under the fourteenth amendment, petitioner is entitled to procedural due process if the property/liberty interest at stake is deemed to be of such magnitude that its loss can fairly be characterized as important; and it depends upon the extent to which the individual will be "condemned to suffer grievous loss." *Morrissey v. Brewer*, 408 U.S. 471, 481(1972) quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123,168 (1951)(Frankfurter, J., concurring). *Goldberg v. Kelly*, 397 U.S. 254, 262-263(1970). Petitioner has a cognizable property right or liberty interest in her right to seek both in the circuit court and on appeal declaratory relief consistent with her counterclaim. *Goldberg*, 397 U.S. at 267-271. *Greene v. McElroy*, 360 U.S. 474, 496-497(1959). See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538;541(1885) ("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures"); *Gibbes v. Zimmerman*, 290 U.S. 326, 332(1933); *Fidelity & Deposit Co. v. Arenz*, 290 U.S. 66, 68 (1933). See also *Boddie v. Connecticut*, 401 U.S. 371, 374-375(1971).

Nor can it be doubted that the actions of the Florida courts including its judicial officers acting in their official capacities is state action governed by the fourteenth amendment. *Palmore v. Sidoti*, 466 U.S. 429,

434(1984). *Shelley v. Kraemer*, 334 U.S.1,16-17(1948).

Once the Due Process Clause applies to the proceedings below, "the question remains what process is due." *Loudermill*, 470 U.S. at 541 quoting *Morrissey v. Brewer*, 408 U.S. at 481. This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 334-335(1976) provides that the process due is determined by weighing "the private interest that will be affected by the official action" against the government's asserted interest,"including the function involved" and the burdens the government would face in providing greater safeguards. *Id.* at 335. The *Mathews* calculus contemplates a balancing of these concerns through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Id.* See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529(2004).

Employing *Mathews'* calculus in order to balance petitioner's legitimate private interest in achieving a fair result upon appeal consistent with the relevant evidence which should have been considered incident to respondent's summary judgment motion against the respondent's corresponding need for a fair adjudication, petitioner submits that the process due her consists at a minimum of a reasonable opportunity to be heard on appeal, to marshal the relevant evidence in support of her cause and to have a fair hearing on the proof adduced. *Armstrong v. Manzo*, 380 U.S. 545, 551-552(1965).*Grannis v. Ordean*, 234 U.S. 385, 394(1914). The refusal by the District Court of Appeal to supplement the record on appeal with the Harris*direct* letter of September 2002 pursuant to its own Rule

9.200(f) for doing so was a denial of the process due petitioner in these circumstances.

After all, once a State provides a procedural framework for disposing of appeals within its system, those appellate remedies must comport with the demands of the due process and equal protection clauses of the federal constitution. *Evitts v. Lucey*, 469 U.S. 387, 393(1985). *Griffin v. Illinois*, 351 U.S. 12, 13-14(1956). See *Ortwein v. Schwab*, 410 U.S. 656, 660(1973). Even Florida's own law supports the proposition that when documents omitted from the record on appeal are necessary for inclusion in the appellate record so that "the ends of justice are best served," the appellant's constitutional right to effective appellate review are "best preserved" when those documents are included in the appellate record. *Hill v. Hill*, 778 So. 2d 967, 968(Fla. 2001).*Gregory v. Gregory*, 289 So. 2d 468, 469(1974). See Fla. App. Rule 9.200(f).

This Court's decisions have established that where evidence referred to in the proceedings below and necessary to a fair determination of the cause of action on appeal is not included in the record on appeal, or where its non-production has not been otherwise accounted for, its omission in this Court warrants an order remanding the matter to the lower court for reconsideration based upon the omitted evidence. See, e.g., *Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364, 373(1939); *Interstate Circuit, Inc. v. United States*, 304 U.S. 55, 56-57(1938); *Wiggins Perry Co. v. O & M Railway*, 142 U.S. 396, 413-414(1892); *Levy v. Arredondo*, 37(12 Pet.) U.S. 218, 219 (1838).

Moreover, the failure of a State appellate court to supplement the record before it when relevant evidence has been omitted is a matter of due process and a fair hearing under the fourteenth amendment. As this Court observed speaking through Justice Holmes in *Saunders v. Shaw*, 244 U.S. 317, 319-320(1917), giving a litigant "a chance to put his evidence in" even at the appellate level in not a mere concession to technicality:

> [W]hen the act complained of is the act of the [State] Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here.

Id. Having by motion sought supplementation of the record both before and after the decision by the District Court of Appeal, contrast *Helis v. Ward*, 308 U.S. 365, 369-370(1939), there was no "more [petitioner] could have done" to assert her due process rights to have this crucial evidence considered by the court of last resort in Florida. *Saunders*, 244 U.S. at 320.

In the final analysis, due process requires a meaningful hearing where the participants are fully armed with the relevant facts so that the decisionmaker is fully informed. *Goldberg v. Kelly*, 397 U.S. at 269-270 citing *ICC v. Louisville & N. R. Co.*, 227 U.S. 88,93-94(1913) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104(1963). The right to this fair hearing does not depend on a demonstration of

certain success, only that it take place. *Loudermill*, 470 U.S. at 544 citing *Carey v. Piphus*, 435 U.S. 247, 266(1978). The District Court of Appeal's refusal to supplement the record prevented a fair hearing from taking place and denied petitioner the process due her under the fourteenth amendment.

2. The District Courts of Appeals' Use of *Per Curiam* Decisions Without Opinion Denies Petitioner Due Process and Equal Protection of the Laws Because It Fails to Inform Petitioner of the Reasons for the Disposition of Her Appeal And Prevents Review by the Florida Supreme Court.

Under Fla. Const. Art. V, § 3(b)(3), the Florida Supreme Court in its discretion may review any decision of a district court of appeal that *expressly* declares valid a state statute, or that *expressly* construes a provision of the state or federal constitution, or that *expressly* affects a class of constitutional or state officers, or that *expressly* and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. The term "expressly" is part of the constitutional language, see *Jenkins v. State*, 385 So.2d 1356, 1357-1359(Fla. 1980), and for the Florida Supreme Court to exercise its discretion to grant review of a decision of any of the district courts of appeal, the decision must fit within one of these four constitutional categories *and* that fact must appear "expressly" on the face *of a written opinion* issued by the district court of appeal. *Id.* See also *Florida Star v. B.J.F.*, 530 So.2d 286, 288 n.3(Fla. 1988).

No particular form of written opinion is required; it need not specifically refer to any of the constitutional criteria as long as it can be determined from the opinion that one or more of the criteria is satisfied. *Ford Motor Co. v. Kikis*, 401 So.2d 1341, 1342(Fla. 1981). Moreover, for the purposes of determining its jurisdiction in this regard, the Florida Supreme Court only considers opinions joined in by a majority of the panel of the district court of appeal; it does not consider a concurring or dissenting opinion standing alone in order to anchor its jurisdiction. *Reaves v. State*, 485 So.2d 829, 830 & n.3(Fla. 1986).

Under the supreme court's internal operating procedures, when notice of a party seeking discretionary review is filed, the clerk's office first determines whether a district court of appeal has written an opinion in the case and, if there is no opinion, the case is automatically dismissed. Although the absence of a written opinion will preclude review by the Florida Supreme Court in almost every case (with the exception of some requests for extraordinary writs), parties before the district courts of appeals are not entitled to demand written opinions which would qualify them for review by the Florida Supreme Court. *School Bd. v. District Court of Appeal*, 467 So.2d 985, 986(Fla. 1986).

Thus there is no pathway to the Supreme Court for a litigant who has requested but failed to obtain an opinion discussing a point on which the litigant desires supreme court review. See Cope, Gerald B., Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System With Those of the Other States and the Federal System*,

45 Fla. L. Rev. 21(1993), *passim.* In 2008, of the 25,419 cases on appeal by notice or petition in the five district courts of appeal in Florida, 10,520 were decided by *per curiam* decisions of a panel affirming the lower court without opinion. Another 9,682 were disposed of by an order of a clerk or a judge without opinion, meaning that the case did not deserve appellate review. Only 4,652 were decided by a written opinion which reference some authority for its result. Thus Florida's intermediate appellate courts decide over 80% of the appeals they hear with *per curiam* orders issued without opinions and the losing party has no right to seek further review of these summary dispositions by the Florida Supreme Court

Because the Florida District Court of Appeal for the Second District elected not to write an opinion on this appeal by petitioner, the Supreme Court of Florida was without jurisdiction to review this case and the Florida District Court of Appeal for the Second District was therefore the highest State court in which a decision could be had. Fla. Const. Art. V, § 3(b)(3). See *Palmore v. Sidoti*, 466 U.S. 429, 431(1984);*Williams v. Florida*, 399 U.S. 78, 80 n. 5(1970); *Jenkins v. Florida*, 385 So.2d 1356, 1359-1360(Fla.1980).

Given the finality of the district court of appeals' *per curiam* decision affirming the circuit court without a written opinion explaining its rationale and the fact that petitioner is now denied the right to have the propriety of this summary affirmance reviewed by the Florida Supreme Court, petitioner submits that this systemic official action by the State of Florida, expressed through its constitutional scheme defining the jurisdiction of the Florida Supreme Court, denies

her the constitutional right to effective appellate review, denies her fair access to the courts, denies her equal protection of the laws and denies her substantive due process. This Court should therefore grant the petition and declare that the Florida courts' use of *per curiam* decisions without written opinion denies the affected appellants due process of law and the equal protection of the laws.

In the first place, the abbreviated procedure for affirming decisions of the trial court with *per curiam* decisions absent any explanation or rationale for the benefit of the parties does not comport with due process because it is incompatible with the concept of a fair hearing. The articulation of reasons for a decision by an appellate court is crucial to the parties affected because its rationality legitimizes the process, justifying the result by reference to prior authority and fostering predictability and normalcy in outcomes. Moreover, reasoned results—anchored by reference to precedent----bolsters the public's confidence in the judiciary and infuses society with a code of behavior founded on rules which allow disputes to be settled in an orderly, predictable manner. See *Boddie v. Connecticut*, 401 U.S. 371, 374-375(1971). See also *Republican Party v. White*, 536 U.S. 765, 790 (2002)(O'Connor, J., concurring).

A rationally explained result will identify the factual predicates for the decisionmaking process on each crucial fact issue while at the same time giving a higher appellate court, either the Florida Supreme Court or this Court, a sufficient record upon which to review the decision. See *Railroad Commission v. Maxcy*, 281 U.S. 82, 83(1930); *Goldberg v. Kelly, supra.*

None of these salutary purposes is served by *per curiam* affirmances issued without written opinions.

At a bare minimum, due process should require that with fully briefed appeals and *a fortiori* with fully argued appeals, the Florida intermediate appellate courts issue opinions or the citation of authorities which it believes justifies the result; and if either of the parties has marshaled alternate arguments, it should identify which arguments prevailed. *Accord,* ABA Standards Relating to Appellate Courts § 3.36(b) & commentary at 67(2000)("Litigants are entitled to assurance that their cases have been thoroughly considered. The public, also, is entitled to assurance that the court is thus performing its duty. Providing that assurance requires that the decision of every case be supported at least by reference to the authorities or grounds upon which it is based.").Anything less deprives parties before the Florida district courts of appeals of a meaningful hearing with a fair opportunity to present their claims. *Armstrong v. Manzo*, 380 U.S. at 552. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437(1982).

In the second place, the provision in the Florida constitution which deprive further appellate review by the Florida Supreme Court where the intermediate courts fail to issue an opinion is an unconstitutional denial of access to the courts. As the *Boddie* Court explained, the State's monopoly over the dispute resolution machinery with its judicial and court personnel means that it must exercise this power evenhandedly so that every litigant is provided due process. 401 U.S. at 374-377. Given that most litigants in the Florida court system do not have any other

choice for resolving disputes, the machinery offered by the State must provide a realistic remedy for all those who enter its system. *Logan v. Zimmerman Brush Co.*, *supra*. *Wolff v. McDonnell*, 418 U.S. 539, 579(1974). *Boddie*, *supra*. *Bounds v. Smith*, 430 U.S. 817, 828(1977).

Thus where the State provides a means of appeal, it cannot then turn this opportunity into one which is discriminatory, arbitrary and totally unrelated to any state purpose. *Id.* See also *Scott v. McNeal*, 154 U.S. 34, 45-46(1894). The practice of issuing *per curiam* decisions without opinions does just that; it penalizes litigants for the dramatic increase in appeals which have beset the court system since 1956. This systemic official action, *Christopher v. Harbury*, 536 U.S. 403, 414-415 & n.12(2002), has deprived appellants in the district courts of appeals of a meaningful hearing on their claims and then deprived them of obtaining further appellate review except by this Court via a petition for certiorari, a less than 1% chance of obtaining any relief. This inadequate judicial machinery frustrates effective appellate review and denies litigants meaningful access to the courts.

Third, this system of *per curiam* decisionmaking without written opinion denies equal protection of the laws to the affected litigants. Two disparate classes are created by this practice absent any legitimate reason for doing so: those litigants who receive written opinions disposing of their claims on appeal thereby entitling them to seek further appellate review by the Florida Supreme Court if they disagree with the court's reasoning and those litigants who receive no explanation for the denial of their appellate claims and

are also deprived of further appellate review of those claims except by this Court via a petition for certiorari. Similarly situated people are thereby treated differently and this intentional disparate treatment without reason is the hallmark of invidious discrimination. *AMTRAK v. Morgan*, 536 U.S. 101, 116(2002). *Missouri v. Jenkins*, 515 U.S. 70, 121(1995).

This disparate treatment of Florida litigants is further highlighted by the fact that Florida is one of only two States which relegate its citizens to a one-tier-only appeal through its issuance of *per curiam* decisions without written opinions. All the other States require the issuance of some kind of memorandum decision by the intermediate appellate court and permit another tier of discretionary further appellate review by the State's highest court in order to provide litigants on appeal with due process and an effective appellate remedy. The disparate treatment of Florida litigants therefore is measured not only by reference to those in-state litigants who receive written opinions but also by those out-of-state litigants who enjoy another tier of appellate remedies unavailable in Florida.

Finally, Florida's appellate machinery denies litigants substantive due process. The essence of substantive due process is an individual's right to be free from the arbitrary action of government, regardless of the fairness of the procedures employed to implement that action. *Collins v. Harker Heights*, 503 U.S. 115, 125(1992). *Daniels v. Williams*, 474 U.S. 327, 331(1986) citing *Dent v. West Virginia*, 129 U.S. 114, 123(1889). It thus serves to prevent governmental power from being "used for purposes of oppression." *Daniels*, 474 U.S. at 331-332(1986) quoting *Murray's*

Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 277 (1856). The systemic official action by the State of Florida, expressed through its constitutional scheme defining the jurisdiction of the Florida Supreme Court and permitting its intermediate appellate courts to decide appeals through the use of *per curiam* decisions without opinions is oppressive, arbitrary and unfair, denying litigants who must resort to this system to resolve disputes their substantive due process rights.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to the Second District Court of Appeals in order to review and reverse its *per curiam* decision without opinion affirming the final summary judgment in respondent's favor and against petitioner by the Circuit Court for Sarasota County and to supplement the record on appeal so that the Harris*direct* letter of September 2002 to the decedent is included therein; and the matter should be remanded to the Circuit Court for Sarasota County for a trial of the factual issues necessary to determine the decedent's intentions about the disposition of his IRA proceeds in the wake of his divorce. This Court should also enter a new judgment declaring that the use of *per curiam* decisions without opinion by Florida's intermediate appellate courts denies affected appellants due process or the equal protection of the laws; or provide petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

DENNIS P. DERRICK
7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610

CARL J. ROBIE, III
Counsel of Record
2525 Sunnybrook Drive
Sarasota, FL 34239
(941)365-2828

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT, IN AND FOR Sarasota COUNTY, FLORIDA

Case No.:
Division:

Andreas David Bothe
Petitioner,

And

Pamela Jean Bothe
Respondent.

MARITAL SETTLEMENT AGREEMENT FOR SIMPLIFIED DISSOLUTION OF MARRIAGE

We, (Husband's full legal name) Andreas David Bothe and (Wife's full legal name) Pamela Jean Bothe, being sworn, certify that the following statement are true:

1. We were married to each other on (date) August 12, 1967.

2. Because of irreconcilable differences in our marriage (no chance of staying together), we have made this agreement to settle once and for all what we owe to each other and what we can expect to receive from each other. Each of us states that nothing has been held back, that we have honestly included everything we could think of in listing our assets (everything we own and that is owed to us) and our debts (everything we own), and that we believe the other has been open and honest in writing this agreement.

3. We have both filed a Financial Affidavit, Florida Family Law Rules of Procedure Form 12.902(b) or (c). Because we have voluntarily made full and fair disclosure to each other of all our assets and debts, we waive any further disclosure under rule 12.285, Florida Family Law Rules of Procedure.

4. Each of us agrees to execute and exchange any papers that might be needed to complete this agreement, including deeds, title certificates, etc.

SECTION I. MARITAL ASSETS AND LIABILITIES

A. Division of Assets. We divide our assets (everything we own and that is owed to us) as follows; Any personal item(s) not listed below is the property of the party currently in possession of the item(s).

1. Wife shall receive as her own and Husband shall have no further rights or responsibilities regarding these assets:

ASSETS: DESCRIPTION OF ITEM(S) WIFE SHALL RECEIVE (To avoid confusion at a later date, described each item as clearly as possible. You do not need to list account numbers. Where applicable, include whether the name on any title/deed/account described below is wife's, husband's, or both.)	Current Fair Market Value
Cash (on hand)	$20950
Cash (in banks/credit unions) Certificates	700,000

of Deposit	
Stocks/Bonds ETrade Acct – Pamela J. Bothe	253,193
Real estate: (Home) 463 Piasso Drive Nokomis FL	1,550,000
Automobiles: Lincoln	22,400
Retirement plans (Profit Sharing, Pension, IRA, 401(k)s, etc.) Pamela J. Bothe	777,782
Furniture & furnishings in home	10,000
Life insurance (cash surrender value) First Colony – Pamela J. Bothe	32,480
Total Assets to Wife	3,366,755

2. Husband shall receive as his own and Wife shall have no further rights or responsibilities regarding these assets:

ASSETS: DESCRIPTION OF ITEM(S) WIFE SHALL RECEIVE (To avoid confusion at a later date, described each item as clearly as possible. You do not need to list account numbers. Where applicable, include whether the name on any title/deed/account described below is wife's, husband's, or both.)	Current Fair Market Value
Cash (on hand)	$79,050
Cash (in banks/credit unions) Certificates of	1,000,000

Deposit	
USAA account Andreas David Bothe	9800
Stocks/Bonds ETrade Acct – Bothe Family Rev Trust	253,193
Notes (money owed to you in writing) Hullinger	25,000
Real estate: (Rental) 11558 Aquamarine Circle, Fountain Valley, CA	740,000
Automobiles: 2000 Mercedes SL 600	35,400
1998 Dodge Pickup	8055
Boats: 9' Suncoaster Sail Boat	200
SeaDoo & Trailer	9500
2002 Harley Davidson morotcycle & trailer	13,000
Retirement plans (Profit Sharing, Pension, IRA, 401(k)s, etc.) Andreas David Bothe	1,089,546
Collectibles Silver Ingot	250
Furniture & furnishings in home	
Life insurance (cash surrender value) First Colony – Andreas David Bothe	32,480
Sporting and entertainment (T.V., stereo, etc.) equipment	10,000
Other Assets: RV airplane kit	27,614
Airplane Engine	16,355
Propeller (airplane)	16,912

Engine Block	400
Total Assets to Husband	3,366,755

B. Division of Liabilities/Debts. We divide our liabilities (everything we owe) as follows

1. Wife shall pay as her own the following and will not at any time ask Husband to pay these debts/bills.

Total Debts to be Paid by Wife	None

2. Husabnd shall pay as his own the following and will not at any time ask Wife to pay these debts:

Total Debts to be Paid by Husband	None

I certify that I have been open and honest in entering into this settlement agreement. I am satisfied with this agreement and intend to be bound by it.

Dated: Feb 21, 2006

s/Andreas David Bothe
Signature of Husband

State of Florida
County of Sarasota

Sworn to or affirmed and signed before me on Feb 21, 2006 by Andreas David Bothe

s/Lisa R. Wheeler
Notary Public

Dated: 2/13/2006

s/Pamela Jean Bothe
Signature of Wife

State of Florida
County of Sarasota

Sworn to or affirmed and signed before me on Feb 21, 2006 by Pamela Jean Bothe

s/Thida Sariya
Notary Public

Recorded: Mar 15, 2006
IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT, IN AND FOR SARASOTA COUNTY, FLORIDA

Case No.: 2006-dr-1548 sc
Division:

Andreas David Bothe
Petitioner,

And

Pamela Jean Bothe
Respondent.

FINAL JUDGMENT OF SIMPLIFIED DISSOLUTION OF MARRIAGE

This cause came before this Court for a hearing on the parties' Petition for Simplified Dissolution of marriage. The Court having reviewed the file and heard the testimony, makes these findings of fact and reaches these conclusions of law:

1. The Court has jurisdiction over the subject matter and the parties.

2. At least one party has been a resident of the State of Florida for more than 6 months immediately before filings the Petition for Simplified Dissolution of Marriage.

3. The parties have no minor or dependent children in common, and the wife is not pregnant.

4. The marriage between the parties is irretrievably broken. Therefore, the marriage between the parties is dissolved, and the parties are restored to the status of being single.

5. Marital Settlement Agreement

a. The parties have voluntarily entered into a Marital Settlement Agreement, and each has filed the required Financial Affidavit. Therefore, the Marital Settlement Agreement is filed as "Exhibit A" in this case and is ratified and made a part of this final judgment. The parties are ordered to obey all of its provisions.

6. Yes. The wife's former name of (full legal name) PAMELA JEAN HANSEN is restored.

7. The Court reserves jurisdiction to enforce the marital settlement agreement.

ORDERED on 3/15/06

CIRCUIT JUDGE

DLJ direct

IRA APPLICATION & ADOPTION AGREEMENT

INVESTOR INFORMATION

Account Owner's Name: Andreas David Bothe
Date of Birth: Oct. 20 1943
Married: Yes
Mailing Address: 463 Picasso Drive
City/State/Zip: Nokomis, FL 34275
Citizenship: U.S.

TYPE OF IRA YOU ARE OPENING

Participant IRA

PLEASE DESIGNATE YOUR
BENEFICIARY(IES) BELOW

I designate the following person or persons below as primary and contingent beneficiaries for my IRA Plan. Please attach additional paper if needed.

A. PRIMARY BENEFICIARY(IES)

Name: Pamela Jean Bothe
DOB: 9-30-45
Mailing Address: 463 Picasso Drive
City/State/Zip: Nokomis, FL 34275
If you are married, is your primary beneficiary your
Relationship: Wife
% of Benefits: 100%
Sex: Female
spouse?: Yes

B. CONTINGENT BENEFICIARY(IES) To receive benefits if none of the Primary Beneficiaries survive me.

Name: Annemarie Bother
DOB: March 31, 1947
Mailing Address: 4065 SW 51st B
City/State/Zip: Ft Lauderdale, FL 33314
Relationship: Sister
% Benefits: 100
Sex: Female

FINANCIAL INFORMATION

Account Owner's Annual Income: $100,000-$250,000
Account Owner's Net Worth: Over $1 million

YOUR EMPLOYMENT INFORMATION

Account Owner's Employer: Retired

***

PLEASE READ AND SIGN BELOW

To: DLJdirect Inc.

I have received and read the Customer Agreement, the Individual Retirement Account Disclosure Statement and Account Plan, and the Pershing Government Account Prospectus, set forth in the DLJdirect IRA disclosure document.

I understand that DLJdirect will invest and reinvest the assets in the account only on my direction and will

not give me legal, investment or tax advice or offer any opinion on the value of any investment for my account.

I understand and agree that DLJdirect may tape-record my telephone conversations.

I understand and agree that I will earn income on funds invested in the Pershing Government Account designated on this application in accordance with the terms of the Prospectus of said fund, a current copy of which I have read and understood.

I understand the following fees may be paid separately or collected from my account balance: (a) and annual maintenance fee: (b) account termination fee. DLJSC may change the fee schedule from time to time, as provided in the Individual Retirement Account Disclosure Statement and Account Plan, and certain other charges may apply.

I understand the rollover rules and conditions and I have met the requirements for making a rollover. Due to the important tax consequences of rolling over funds or property I have been advised to see a tax professional. All information provided by me is sure incorrect and may be relied on by DLJdirect. I assume full responsibility for rollover transactions and will not hold DLJdirect liable for any adverse consequences that may result. If I choose to make a rollover contribution, I hereby irrevocably designate this contribution and funds or other property as a rollover contribution.

I hereby adopt the Donaldson, Lufkin & Jenrette Securities Corp. Individual Retirement Custodial

Account Plan (the "Plan") (or any successor pursuant to the terms of the Plan which is made part of this agreement, establish the Account described above, name DLJSC as Custodian if executed in due course. I have read and understand, and agree to be bound by the conditions of the Plan, the DLJdirect Customer Agreement, and the Pershing Government Account as described in the DLJdirect IRA Customer Agreement brochure containing the IRA Disclosure Statement and Account Plan (REV. Oct. 1992) as amended from time to time.

Please note that the DLJdirect Customer Agreement contains a pre-dispute arbitration agreement, which is set forth in paragraph 22 & 23 of the Customer Agreement.

s/Andreas David Bothe
Date: Oct 5, 1998

Harrisdirect
Harborside Financial Center
501 Plaza II
Jersey City, New Jersey 07311

September 2002

IRA FBO ANDREAS D. BOTHE
DLJSC AS CUSTODIAN
463 PICASSO DR
NOKOMIS, FL 34275-1448

Dear Harrisdirect Customer,

We are writing to inform you of some administrative changes to your retirement account. Effective November 1, 2002, Donaldson, Lufkin & Jenrette Securities Corporation will resign as Custodian of your retirement account and appoint Harris Investor Services LLC ("HIS") as the new custodian. You will still have the same account number and continued access to your account through the Harrisdirect services you have come to enjoy.

While the change in custodianship of your retirement account has little effect on your account, it does require that you complete a new adoption agreement. To complete this change, the IRS requires a formal agreement between you and HIS to ensure that your account continues its special tax advantages. Accordingly, we ask that you review the new retirement documents and return the completed adoption agreement in the postage paid envelope provided. If you do not return the completed form or transfer your account by November 1, 2002, we may

close your retirement account and distribute the assets to you, at which point you may be subject to income and penalty taxes arising from the distribution unless you roll over the assets to a new retirement account within 60 days. If you would rather transfer your account to another custodian, please do so within thirty (30) days from the date of this letter. Please note that choosing another custodian will terminate your account with Harrisdirect and you will be charged a $75 termination fee as well as the appropriate current year annual maintenance fee.

If you wish to update the contact information for your account, you may do so in the Account Settings section of the Harrisdirect Web site. Additionally, you can change the beneficiary designation for your account by sending us a completed IRA Designation of Beneficiary form that is available in the Customer service section of our web site.

If you have any questions, please contact a Harrisdirect representative at 1.800.825.5723 or visit a Harrisdirect Investment Center near you.

Sincerely,
Barry Mione
Managing Director of Investor Services Harris Investor Services LLC
Member NASD, SIPC
Donaldson, Lufkin & Jenrette Securities Corporation

March 21, 2006

Last Will and Testament of Andreas David Bothe

I have various assets in my state. Because a recent divorce, some are owned by me individually, and others are in a Family Trust.

My former wife, Pamela Jean Bothe, who is now known as Pamela Jean Hansen is one of the current trustees. Because I have not removed her from that position I believe that she may distribute those assets that are currently in the Trust in accordance with its provisions. Therefore, all assets owned by the Trust should stay there for the benefit of the surviving trustee and grantor, Pamela Jean Bothe, who is now known as Pamela Jean Hansen.

I wish to leave my Individual Retirement account to Margaret Lindsey. I don't know the mechanics of this. However, it is with E Trade Financial, account number 5729-3255. it is my wish that she have this for her retirement.

I have a Mercedes-Benz Automobile, a Harley-Davidson Motorcycle, and a Sea Doo watercraft that are owned by me individually. The titles are on the dining room table at my residence, 5029 Hanging Moss Lane.

I have a stock account with E Trade 6087-2086 in my individual name.

I wish to leave the stock account and all other items owned by me individually to my sister, Anne Marie

Bothe. I request that the trustee distributes the other stock account with E Trade 5726-8590, which is in the name of the trust, also to my sister,Ann Marie Bothe. Because my E Trade account, 6087-2086 is an Option account I asked that my friend Henry Whitmore advise my sister, Ann Marie Bothe on its proper administration.

I forgive the obligation my sister, Ann Marie Bothe, owes me on a second mortgage on her home in Hollywood, Florida. When the mortgages satisfied in the title clear, I wish the proceeds to go to her, I don't know the mechanics of this. However, that is my wish.

I wish the benefit of my First Commie Life Insurance policy go to my former wife, Pamela Jean Bothe, now known as Pamela Jean Hansen. She is the beneficiary on the policy now. Is my wish that any proceeds go to her.

I have a partially completed airplane located in a hangar, JI-113, at the Sarasota Brandenton Airport. There are sufficient resources in my estate for the disposal of the airplane and the return of the hangar to the condition required by the airport authority. I asked the trustee to coordinate the disposal and return of the hangar to its original condition.

All the documents that I have are on the dining room table at 5029 Hanging Moss Lane.

s/Andreas David Bothe
Andreas David Bothe
March 21, 2006

A.David Bothe
5029 Hanging Moss Lane
Sarasota, Florida 34238
March 21, 2006

Hey,

I love you. This is really hard for me today. I so wanted to start my life over again with you as my wife and companion.

The last 20 years with Pam have been very tough. I resented many of the things she did. I always felt she had other priorities.

I so loved being with you.

But, this damn depression started working on me again. I keep trying to fight it. It keeps coming back. Somehow Pam found all my e-mails to you. I don't understand how that happened. Most of them prior to September were quite innocuous. But, it seems she found a way to get to almost all of them.

Even though there was nothing between us until the separation, I still feel a tremendous sense of betrayal and guilt. That is not your fault. You have been wonderful.

I'm just very mentally screwed up. I can't realty bring you into a situation where you need to take care of me. I don't want to be put in some institution. I have not been able to sleep or relax since January 15. I truly cannot cope.

I have enclosed my last will and testament. I'm sure you will have to get a lawyer to receive the money from the retirement plan. I don't know anything about the legalities of a will. But since I have-written out my wishes in some detail I would hope that a court would grant them.

I know I am a coward. It seems as though I hurt others very much without meaning to. I just wanted to be happy. I am so sorry about all of this. I hope you can forgive me.

Goodbye
s/Dave

Case No. 2D08-557
IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANNEMARIE BOTHE Appellant,
v.
PAMELA JEAN HANSEN, Appellee.

Opinion filed November 7, 2008.

Appeal from the Circuit Court for Sarasota County; Robert B. Bennett, Jr., Judge.

Carl J. Robie, III, Sarasota, for Appellant.
Susan J. Silverman, Sarasota, for Appellee.

PER CURIAM.

Affirmed.

FULMER, WALLACE, and LaROSE, JJ., Concur.

May 8, 2008
CASE NO.: 211308-557
L.T. No.: 06-CA-4875 SC

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANNEMARIE BOTHE Appellant,
v.
PAMELA JEAN HANSEN, Appellee.

BY ORDER of THE COURT:

Appellant's motion to supplement the record is granted as to the court order of March 27, 2008, dismissing E*Trade, and is denied as to the September 2002 letter from Harrisdirect to appellant. Appellant shall make arrangements within three days with the clerk of circuit court for the supplementation of the record with the items mentioned in the motion, with the supplemental record to be filed in this court within twenty-five days from the date of this order,

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

James Birkhold Clerk

CASE NO. 2006 CA 4875 SC

IN THE CIRCUIT COURT IN AND FOR
SARASOTA COUNTY, FLORIDA CIVIL DIVISION
H

PAMELA JEAN HANSEN, Plaintiff,
VS.
E*TRADE FINANCIAL CORP., a foreign
corporation, and ANNEMARIE BLITHE, Defendants.

FINAL SUMMARY JUDGMENT

This case was heard on plaintiff's motion for summary judgment. The court having reviewed the pleadings, including those filed in support of and in opposition to, the motion, as well as the legal precedents argued by the parties, and being otherwise fully advised in the premises, finds as follows:

Plaintiff was previously married. Her marriage was dissolved March 15, 2006. Her former husband is now deceased.

Plaintiff and her former husband entered into a marital settlement agreement which provided for equitable distribution of certain assets. Among the assets received by the deceased former husband was an IRA account which the former husband had opened with a company called DLJ Direct. The decedent, at the time of opening the account, had designated his then (now former) wife the primary beneficiary of the account. At some point, the account was acquired by defendant, E*TRADE. When the marital settlement agreement was executed, the IRA account was identified as an

account with E*TRADE. Therefore, it is clear that the decedent was aware that his IRA account was held by E*TRADE at the time the decedent and plaintiff were divorced.

The marital settlement contained no provision requiring decedent to designate a beneficiary.

Plaintiff, by executing the marital settlement agreement, gave up any right she then had to claim an interest in the IRA. account. At that point, plaintiff had a mere expectancy which was subject to extinction had decedent designated a different primary beneficiary.

E*TRADE has policies regarding the designation of, and change of, beneficiaries for its IRA accounts. One of those policies provides that changes of beneficiary "only be made on a form provided by or acceptable to us..." The E*TRADE policies further require that any change of beneficiary be "filed with us during your lifetime."

Decedent never filed a change of beneficiary with E*TRADE on a form provided by or acceptable to E*TRADE during decedent's lifetime.

Both the plaintiff and the defendant, Bothe, seek declaration of their rights to the IRA account.

The holding in Luszcz v. Lavoie, 787 So.2d 245 (Fla. 2d DCA 2001) is dispositive of the issues in this dispute

Based on the foregoing, it is ADJUDGED:

1. Plaintiff is entitled to al lproceeds of the decedent's

E*TRADE IRA account (Account No. 5739-3255), and defendant, E*TRADE, shall pay those proceeds over to plaintiff as she may direct.

2. Defendant, ANNEMARIE BOTHE, both individually and as personal representative of decedent's estate shall take nothing by her counterclaim.

3. The court reserves jurisdiction to enforce the provisions of this judgment and to determine any issues regarding attorney fees and costs.

ADJUDGED at Venice, Sarasota County, Florida this 1st day of February, 2008.

Robert B. Bennett, Jr.
Circuit Judge

December 31, 2008
CASE NO.: 211308-557
L.T. No.: 06-CA-4875 SC

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANNEMARIE BOTHE Appellant,
v.
PAMELA JEAN HANSEN, Appellee.

BY ORDER of THE COURT:

Appellant's motion for rehearing, rehearing en banc and or written opinion is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

James Birkhold
Clerk

(2)

No. 08-1504

FILED
JUN 18 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ANNEMARIE BOTHE,

Petitioner,

v.

PAMELA JEAN HANSEN,

Respondent.

On Petition For A Writ Of Certiorari To The Second District Court Of Appeal For The State Of Florida

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner presents no "compelling reasons" for the Court to grant its Petition for a Writ of Certiorari ("Petition"). *See* Supreme Court Rule ("Sup. Ct. R.") 10. The Florida District Court of Appeal for the Second District's ("Second District") opinion was a unanimous *per curiam* decision of a three-judge panel affirming a final summary judgment in Respondent's favor by the Circuit Court in and for Sarasota County ("Circuit Court"). There is no conflict with any decision of another United States Court of Appeals on the same matter. The Second District did not decide an important federal question that conflicts with a decision by a state court of last resort or of a United States Court of Appeals. Nor did the Second District decide an unsettled but important question of federal law. Sup. Ct. R. 10(a), (b) and (c).

In her attempt to identify an issue meriting this Court's attention, Petitioner has worded the questions presented by utilizing broad assertions implicating procedural and substantive due process and equal protection of the laws. There is no constitutional issue here; nor is there any issue of considerable national importance. Instead, the Second District's decision was based upon independent and well-established state law grounds over which this Court lacks jurisdiction. The Second District followed and applied well-established Florida case law regarding the disposition of a decedent's Individual Retirement Account (IRA) proceeds. The resolution of this question by the Circuit Court, and then the Second

District, is of no general importance to the development of the law or to other cases. Florida appellate courts are consistent in their approach to this issue. None of the criteria warranting this Court's review is present in this case. Therefore, the Petition should be denied.[1]

COUNTER-STATEMENT OF THE CASE

This case involves a claim by Petitioner that Respondent, Pamela Jean Hansen, is not entitled to receive the decedent's (IRA) proceeds pursuant to her designation as primary beneficiary.

Respondent is the former wife of the decedent, Andreas David Bothe. The marriage was long-term, (39 years), which ended in dissolution on March 15, 2006. (R. 45). The final judgment of dissolution ratified a Marital Settlement Agreement, (MSA) executed on February 21, 2006. (P. 1a-6a). Under the description of items husband was to receive, the MSA included his retirement plan in the amount of $1,089,546. (R. 40; P. 4a). The MSA did not contain any express language concerning the disposition of the decedent's IRA, except for its inclusion in the list of assets.

[1] References to Petitioner's Petition for Writ of Certiorari will be as (P. ___) followed by a page number. References to the Record on Appeal will be as (R. ___) followed by a page number. References to the transcript of the summary judgment hearing will be as (T. ___) followed by a page number.

There was no requirement in the MSA for either party to re-designate or change IRA beneficiaries. (P. 1a-6a). There was no provision specifically referring to a release or waiver of either party's rights as a named beneficiary in the IRA. (P. 1a-6a).

When the decedent first opened his IRA account in October, 1998 with Donaldson, Lufkin & Jenrette Securities Corporation, a DLJ *direct* account, he designated Respondent, (then Pamela Jean Bothe), as the primary beneficiary, and Petitioner, Annemarie Bothe, his sister, as the contingent beneficiary. (P. 9a-10a). E*Trade Financial Corporation, (hereinafter referred to as E*Trade), assumed the IRA account sometime around January or February of 2006. (R. 2, 15, 268). E*Trade's own pleadings asserted that it was the custodian of the IRA account of the decedent. (R. 793).

The decedent passed away on March 22, 2006, without having made any change to the IRA's beneficiary designation form. E*Trade did not receive any communication from the decedent concerning any change to his beneficiary designation. (R. 16). Respondent requested that E*Trade pay over the proceeds of the IRA to her in accordance with the beneficiary designation. E*Trade did not assert any claim to the IRA account, but would not release the funds without a court order, and demanded that an action be brought to determine the rights and obligations of the parties. (R. 3, 4, 16).

This action commenced in the Circuit Court with the filing of Respondent's complaint for declaratory relief against Petitioner and E*Trade. (R. 1-14). She sought a declaration that she was entitled to receive the IRA proceeds pursuant to her designation as primary beneficiary. (R. 4). Petitioner was named as a party as she may have asserted an interest in the account. (R. 3, 16). The complaint alleged that the decedent had established an IRA account on October 5, 1998, which was later assumed by E*Trade, and assigned E*Trade account number [Financial Account Number Omitted]. (R. 2). E*Trade's answer admitted that allegation to be true. (R. 15). The decedent's own correspondence of March 21, 2006 referred to his IRA as an E*Trade account and provided the account number. (R. 502). Petitioner responded to the complaint and counter-claimed for declaratory relief. (R. 27-45).

Respondent filed a motion for summary judgment, asserting the absence of genuine issues of material fact. (R. 91-114). It was uncontroverted that the decedent established an IRA account on October 5, 1998 and the designated primary beneficiary on the IRA Application and Adoption Agreement was Respondent. (R. 92, 6, 36; P. 9a-10a). It was undisputed that the MSA listed the IRA as decedent's asset and did not contain any express language directing the re-designation of named beneficiaries. (R. 92, 8-14, 38-44; P. 1a-4a). The decedent died on March 22, 2006 without formally changing the named beneficiaries on his IRA, nor did he ever provide

Respondent or E*Trade with the forms which would have been required to change the designated beneficiaries. (R. 93, 31, 16).

The substantive issue of law argued in support of the summary judgment motion was whether, based on the undisputed facts, the bright line rule of *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001) applied. That case held that upon the death of an IRA owner, the institution holding the funds need look no further than the IRA contract to determine the beneficiary. Conspicuously absent from Petitioner's Petition is any mention of the controlling state appellate decision that governed the outcome of this case.

In opposition to Respondent's motion, Petitioner argued that an issue of fact existed as to whether E*Trade was acting as the custodial agent for the decedent as to the IRA. (R. 756; T. 874). She argued that an issue of fact existed as to whether E*Trade's IRA agreement, produced by E*Trade in discovery, controlled the change of beneficiary designation. (R. 762, 111; T. 874).

The Circuit Court heard oral argument on the motion for summary judgment. Respondent again argued that this action was directly controlled by *Luszcz v. Lavoie*. Since the decedent died without having sent a beneficiary designation change to E*Trade, and the IRA had been distributed to him in the MSA to do with as he pleased, the proceeds were payable, as a matter of law, to Respondent. E*Trade never received any communication from Mr. Bothe

before his death concerning any change to his beneficiary designation.

The Circuit Court entered a final summary judgment ruling that *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001) was dispositive of the issues in this dispute. (P. 22a). Consistent with that ruling, it found that Respondent was entitled to all the proceeds from decedent's E*Trade IRA account. (P. 23a). The Circuit Court considered and rejected Petitioner's arguments that Respondent was not entitled to the IRA proceeds.

Petitioner appealed the Circuit Court's judgment to the Second District. The issues were fully briefed and orally argued before a three-judge panel. On November 7, 2008, the Second District affirmed the Circuit Court *per curiam*. (P. 19a). Petitioner filed a motion for rehearing, rehearing *en banc*, and request for a written opinion which was denied by the District Court. (P. 24a).

Petitioner's Statement of Case relied upon a September 2002 letter from Harris*direct* to the decedent regarding some administrative changes to his IRA. (P. 10, 12). That letter was not before the trial court for consideration at the time of the hearing which resulted in the order on review, and therefore, was properly not included by the Circuit Court Clerk in the preparation of the record on appeal. Petitioner filed a motion in the Second District to supplement the record with that letter, which was denied. (P. 20a). Fla. R. App. P. 9.200(f) contemplates supplementing

the record with documents if there is an error or omission in the record, or the record is incomplete. It does not contemplate supplementing the record with documents that were not considered by the decision-maker in rendering his order. The September 2002 letter was an item listed on Petitioner's Supplemental Exhibit List, filed two days after the hearing on the motion for summary judgment. The Exhibit List was prepared in contemplation of trial, which did not ultimately take place because the case was disposed of on summary judgment. The fact that the letter was deemed to be a possible exhibit at trial did not convert it into evidence that was admitted by the trial court for its consideration in rendering its judgment. Hence, there was no error in the denial of the motion to supplement the record.

Even if the contents of the Harris*direct* letter were considered, it would not have affected the outcome and therefore, was not necessary to a fair determination of the case. By the time of decedent's death, E*Trade was the IRA's custodian, having acquired Harris*direct*'s accounts. After E*Trade took over, it provided an IRA agreement stating a designation of a beneficiary may only be made on a form provided by or acceptable to E*Trade. E*Trade never communicated to Mr. Bothe that the designation form it had was not acceptable to it.

Petitioner suggested that E*Trade would have sent any requirements for changing the IRA beneficiary to the marital home, which Mr. Bothe had moved out of in anticipation of divorce. (P. 10). This

suggestion ignores the fact that Mr. Bothe carried on business, and had a course of dealing, with E*Trade after it assumed the maintenance of his accounts. He contacted E*Trade with instructions after the separation in 2005, when he and Respondent decided to split the stock account held by the Bothe Family Revocable Trust as part of their marital distribution. That is reflected by the $253,193 figure in the MSA for each of them. (P. 3a, 4a). Just prior to his death, he identified the IRA as an E*Trade account, using the E*Trade account number. (P. 15a). Mr. Bothe was a savvy businessman, and had been a licensed life insurance agent in California, owning his own insurance agency. If Mr. Bothe wanted to change the beneficiary of his IRA, he had ample opportunities to do so. By the same token, if E*Trade was unhappy with the beneficiary designation form, it had many opportunities to communicate with Mr. Bothe about it during their discussions of other transactions.

In an effort to distract the Court from the well-established rule of state law that controls the outcome of this case, Petitioner relied on an unwitnessed document entitled "last will and testament" dated March 21, 2006, which was of no legal effect under Florida law, as well as a letter to Margaret Lindsey of the same date. (P. 8, 15a-18a). Neither of these documents, provided to third parties and not to E*Trade, qualified as a beneficiary change governing E*Trade's distribution of the IRA proceeds.

In a feeble attempt to elevate its disagreement with the Circuit Court's judgment, which was affirmed

by a three-judge panel of the District Court after oral argument, to one worthy of this Court's review, Petitioner criticized the Circuit Court's judgment because it characterized Petitioner as decedent's personal representative, which she was not. (P. 11, 23a). This characterization had no impact on the conclusion reached that Petitioner was not entitled to recovery under her counter-claim. The Circuit Court's decision had nothing to do with either party's capacity as personal representative. If that language was excised as surplusage, the effect of the judgment would not have been altered. It was immaterial to the result and therefore, harmless.

As a further attempt to discredit the Circuit Court's ruling, Petitioner stated the judgment erroneously found that the MSA identified the IRA as an account with E*Trade. (P. 11, 21a-22a). Again, this had no effect on the result because there was never any confusion about the identity and the holder of the IRA account. In the MSA, it was identified as a retirement plan, and the exact amount of the account of $1,089,546 was entered. (R. 10; P. 4a). The E*Trade IRA was the only account that held that amount of money. E*Trade's own pleadings admitted it was the custodian of the account, and the decedent's correspondence a day before his death referred to his IRA as an E*Trade account and provided the E*Trade account number. (R. 15, 502; P. 15a).

Upon the Second District's denial of Petitioner's motion for rehearing, rehearing *en banc* or for a written opinion, she sought review in this Court.

REASONS FOR DENYING THE WRIT

1. Florida's Second District Afforded Petitioner Procedural Due Process By Providing An Opportunity to be Heard at a Meaningful Time and in a Meaningful Manner.

Petitioner does not contend that the decision of the District Court creates any circuit court of appeals conflict or that it decided an important federal question that has not been settled by this Court. Instead, she argued that by refusing to supplement the record on appeal with the September 2002 letter, the District Court denied her procedural due process.

As a preliminary matter, whether any procedural protections are due depends on whether the individual will be condemned to suffer grievous loss. *Morissey v. Brewer*, 408 U.S. 471, 481 (1972).[2] In this case, Petitioner was not the individual who would suffer any loss, in that if her position had been adopted by the lower courts, she would not have received the IRA proceeds. If she had prevailed, the courts would have

[2] In *Morissey*, this Court held that before parole could be revoked, minimal due process required a preliminary hearing to determine probable cause to be conducted promptly at a convenient place.

nullified the beneficiary designation naming her as contingent beneficiary, and then would have turned the proceeds over to Margaret Lindsay.

Petitioner argued that by seeking supplementation of the record at the appellate level, she did what she could have to assert her due process rights. (P. 20). Respondent respectfully disagrees. Since review of a state-court judgment is being sought, Sup. Ct. R. 14.1(g)(i) requires a Petitioner's statement of the case to contain specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. The Petition does not contain the specific statements because the constitutional issues raised are being raised for the first time herein, which must not be permitted. *See United States v. Bean*, 537 U.S. 71, 75, n.2 (2002) (holding argument was waived because it was raised "for the first time in his brief on the merits to this Court."). Petitioner's motion for rehearing, rehearing *en banc* and for a written opinion filed in the District Court complained about the failure to supplement the record on appeal, but did not specifically assert a denial of procedural

due process or otherwise raise any federal questions. Instead, she relied on decisions from Florida appellate courts which decided the state law issue regarding supplementation of the record. Therefore, this Court should not consider the merits of this constitutional argument as a basis for the exercise of its certiorari jurisdiction.

Procedural due process demanded by the Florida and Federal Constitutions contemplates fair notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Even if Petitioner was the individual entitled to procedural due process, and even if this Court does not consider the argument to be waived, she had reasonable notice of the matters placed at issue by the pleadings, including Respondent's motion for summary judgment. Petitioner was given, and took advantage of, every opportunity to appear, argue the issues presented by her defenses and counter-claim, and otherwise protect her interests. The Circuit Court's judgment did not rule on any issues outside the scope of the pleadings and arguments. It simply fulfilled its duty to apply the correct principle of law to the facts.

Petitioner asserted the September 2002 letter of Harris*direct* created an issue of fact as to whether decedent's IRA plan and beneficiary designation was revoked. (P. 14-15). As a result, she argued, the denial of the opportunity to supplement the record on appeal with that letter denied her procedural due process by constricting the evidence helpful to show the IRA plan was no longer in effect. (P. 15-16).

Procedurally, there was no error in the denial of the motion to supplement the record. The letter was not evidence admitted by the trial court for its consideration in rendering its Final Judgment. A party is not entitled to a trial on the possibility that an issue of material fact might turn up at the trial. Petitioner's attack on the Final Judgment would, if entertained as valid, prevent any summary judgment and render the summary judgment rule a nullity, since there would be no conceivable summary judgment that could not be similarly attacked. The Second District correctly applied Fla. R. App. P. 9.200(f) in denying, in part, Petitioner's motion to supplement the record, in that the rule contemplates supplementing the record with documents if there is an error or omission in the record, or the record is incomplete. It does not contemplate supplementing the record with documents that were not considered by the trial judge in rendering his judgment. The Second District simply followed Florida's familiar procedure and practice in the administration of its appellate rule, a matter reserved to the states.

Substantively, the letter would not have affected the outcome, and therefore, was not necessary to a fair determination of the case. The issues raised by Petitioner regarding the mergers between brokerage houses after the IRA account was opened were thoroughly addressed in the briefs and at oral argument. The decedent, a sophisticated retired businessman, carried on business directly with E*Trade after it assumed maintenance of his various accounts. There

was a course of dealing on an ongoing basis between E*Trade and Mr. Bothe. He communicated instructions to E*Trade regarding his accounts, which E*Trade acted upon. E*Trade had ample opportunities to object to the beneficiary designation form if it was unacceptable to it. It never did; nor did Mr. Bothe ever change the named beneficiary on the form. Banks and brokerage houses merge all the time without any meaningful legal change to the accounts assumed and without voiding previously executed beneficiary designation forms. Accordingly, there was no point in trying the issue raised by the letter. The Circuit Court had the complete establishment of the facts necessary for the application of controlling state law without the 2002 letter.

The decedent, who was free to change the beneficiary designation of his IRA to any person, did not take formal steps before death to remove Respondent as beneficiary, such as notifying the custodial entity or completing a new beneficiary designation form. The controlling law in the Second District on the precise issue presented is *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001). In that case, the Court held that the ex-husband was entitled, as a beneficiary, to receive his ex-wife's IRA proceeds upon her death, even though she was disabled at the time, and he had received a portion of the IRA in the divorce. The holding was based on the premise that the husband's IRA rights as a beneficiary arose out of a contract with an institution, not out of the marriage relationship, and the wife's guardian had not changed the

beneficiary. A beneficiary's rights to proceeds do not attach until the IRA owner's death, as until then, the beneficiary merely has an expectancy in the IRA. Until death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.

The Court stated that unless the dissolution judgment requires a spouse to name a particular beneficiary as a condition of the dissolution, the owner of the IRA is free to name whomever desired as the beneficiary. Upon the owner's death, the financial institution need look no further than the IRA contract to determine the beneficiary, as otherwise, the institution could never be certain whom to pay and would nearly always have to resort to going to court. In the end, it is the IRA owner's responsibility to change the beneficiary designation if a change is desired.

The Second District, in *Luszcz v. Lavoie*, concluded that the beneficiary designation in an IRA contract controls unless the IRA owner was required to designate a particular beneficiary as a condition of a dissolution of marriage. The court also concluded that the beneficiary designation in an IRA contract controls over that part of an IRA the owner was awarded in a dissolution of marriage, and because an IRA is a contract with an institution, not with a spouse, this holding applies regardless of whether the parties to the dissolution have executed releases.

Luszcz v. Lavoie is completely consistent with existing Florida case law and has been followed by

more recent Florida appellate decisions. For example, in *Smith v. Smith*, 919 So.2d 525 (Fla. 5th DCA 2006), the appellate court held that a former wife was entitled to the proceeds of insurance policies, retirement plans and accounts of which she was the named beneficiary. This conclusion was reached despite the fact that an MSA entered into prior to the dissolution of marriage and incorporated therein identified the various insurance policies and retirement plans. The agreement indicated that "Husband shall receive as his own and Wife shall have no further rights or responsibilities regarding these assets." That language was virtually identical to the "waiver" language in the Bothe MSA. The agreement in *Smith*, just as in the subject case, made no mention of the proceeds of the policies and plans.

In *Waller v. Pope*, 715 So.2d 958 (Fla. 2d DCA 1998) the issue was whether funds contained in a credit union account and pension beneficiary benefits, both listing former wife of the decedent as beneficiary, should go to the wife or pass through the estate of the deceased. The beneficiary designation on each of those assets remained unchanged. There was a general release clause in the property settlement agreement. The court recognized that the decedent could have changed the named beneficiary anytime during his lifetime, because the agreement did not require him to maintain her as a beneficiary on those assets. However, once he died, her rights became established.

Luszcz, *Smith* and *Waller* all rely on the Florida Supreme Court case of *Cooper v. Muccitelli*, 682 So.2d

77 (Fla. 1996) that involved a divorce and an MSA which had a mutual release clause in which each party waived all claims against the other. During the marriage, the former wife was named as primary beneficiary and his sister was secondary on an insurance policy. After the divorce, the former husband left the life insurance policy unchanged. About six months after the divorce, the former husband committed suicide and the ex-wife and the sister filed for the proceeds of the policy.

The Florida Supreme Court concluded that the plain language of the insurance document controlled. To the extent that the former wife may have claimed a right to remain primary beneficiary under the policy as a condition of the dissolution of marriage, she waived any such claim when she signed the agreement with the release clause. As a result, the former husband was free to designate whomever he wished as beneficiary. To determine whom he intended as beneficiary, the Court needed to look no further than the plain language of the policy itself, naming the former wife as primary beneficiary.

Petitioner's position is that the person entitled to the proceeds of the policy is whoever the decedent may have intended it to be, even if not the named beneficiary. It requires little imagination to envision the mischief that would be caused by the adoption of such a rule. Disputes among friends, relatives, and heirs of the decedent would be a regular occurrence. Insurance companies would invariably deposit the proceeds in court because they would be afraid to rely

on their records. The adoption of such a rule would be detrimental to the administration of justice.

There was no evidence presented to dispute that when the MSA was entered into, and prior thereto, Hansen had been designated by the decedent as the primary beneficiary on his IRA account, with Bothe as contingent beneficiary. There was also no evidence presented to dispute that the decedent never communicated to E*Trade that he intended to change his beneficiary, even though he and E*Trade had been involved in other transactions since E*Trade took over Harris*direct*'s accounts. Therefore, the Circuit Court correctly looked no further than the designated beneficiary form to decide this case, and the Second District correctly affirmed that decision, relying on the controlling Florida appellate precedents.

Whether Mr. Bothe may have thought about changing his beneficiary or not does not create an issue of fact as to whether he ever communicated a beneficiary change to E*Trade. It is undisputed that he did not. The trial court correctly applied the rule of *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001) and other Florida precedent in granting Hansen's motion for summary judgment which was properly affirmed by the District Court.

2. The Use of *Per Curiam* Affirmances By Florida's District Courts of Appeal Does Not Result in a Denial of Due Process or Equal Protection of the Laws.

As a reason for granting the Writ, Petitioner argued that Florida's District Courts of Appeal's use of *per curiam* decisions without a written opinion denied her due process and equal protection of the laws. A *per curiam* affirmance is an appellate opinion affirming a trial court's decision but without stating any reason for doing so.

Whittled down to its essence, Petitioner's argument is that because, under Fla. Const. Art. V, §3(b)(3), the Florida Supreme Court's discretionary jurisdiction is limited to appeals from written opinions, the issuance of a *per curiam* affirmance by the District Court denied her a pathway to the Florida Supreme Court. As a result, she argued, she was denied substantive due process and equal protection of the laws. (P. 21-28).

Just as in Argument 1, above, Petitioner failed to comply with Sup. Ct. R. 14.1(g)(i), requiring specification of where and when the federal questions sought to be reviewed were raised, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. Again, the constitutional issues argued are being raised for the first time therein. In her motion for rehearing, rehearing *en banc*, and for a written opinion directed to the

District Court, Petitioner complained about the *per curiam* affirmance, but raised no federal questions in doing so. She relied on decisions from other state appellate courts in Florida which decided the same state law issues raised by the pleadings in this case, asking the court to find an express conflict with those decisions. She did not argue there was any issue of great public importance. Therefore, this Court should not consider the merits of this constitutional argument as a basis for the exercise of its certiorari jurisdiction. However, even if this Court decides to consider the merits of this argument, it does not present a basis for this Court's review.

In support of her argument, Petitioner asserted that parties before the District Courts are not entitled to demand written opinions which would qualify them for review by the Florida Supreme Court. (P. 22). That is incorrect. Effective January 1, 2003, Fla. R. App. P. 9.330(a), the Florida appellate rule governing motions for rehearing, was amended to add the following language:

> When a decision is entered without opinion, and a party believes that a written opinion would provide a legitimate basis for supreme court review, the motion may include a request that the court issue a written opinion. If such a request is made by an attorney, it shall include the following statement:
>
> "I express a belief, based upon a reasoned and studied professional judgment,

> that a written opinion will provide a legitimate basis for supreme court review because (state with specificity the reasons why the supreme court would be likely to grant review if an opinion were written)."

The case authority cited for the proposition that a party is not entitled to demand a written opinion which would qualify him or her for review by the Florida Supreme Court was decided in 1986, 17 years before the amendment to the rule was adopted. *See School Board v. District Court of Appeal*, 467 So.2d 985 (Fla. 1986).

Petitioner was fully aware of her right to ask the District Court to issue a written opinion after it decided the appeal *per curiam*. Indeed, she filed a motion for rehearing, rehearing *en banc*, and for a written opinion. Counsel for Petitioner included the statement required by Rule 9.330(a), asserting that a written opinion would provide a legitimate basis for Supreme Court review because the District Court's decision conflicted with *Cooper v. Muccitelli*, 682 So.2d 77 (Fla. 1996); *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001); *Waller v. Pope*, 715 So.2d 958 (Fla. 2d DCA 1998); and *Hoffman v. White*, 277 So.2d 290 (Fla. 4th DCA 1973). The cases relied upon by Petitioner in her motion for a written opinion are all Florida state appellate decisions, including one decision from the Supreme Court of Florida. Petitioner's own motion demonstrated that the issues raised by her appeal rested on independent state law grounds.

No federal issue was raised; nor was any issue of great public importance raised.

A *per curiam* disposition affirming a trial court order without a written opinion occurs when the points of law are so well-settled that a further writing would serve no useful purpose. *Elliott v. Elliott*, 648 So.2d 137, 138 (Fla. 4th DCA 1994). It serves as a timely method to announce a correct result in a case where the Appellant has not established that a harmful preserved or fundamental error warrants correction and the case does not have public value as precedent. It also prevents the proliferation of unnecessary case law on settled propositions, and as a result, avoids duplicative opinions and simplifies legal research. *Whipple v. State*, 431 So.2d 1011 (Fla. 2d DCA 1983).

The *per curiam* decision in this case was justified because the points of law raised by Petitioner are well established by the appellate courts in Florida, including the Florida Supreme Court. It does not involve new or unusual points of law.

The Circuit Court properly granted Final Summary Judgment, as it specifically found the holding in *Luszcz v. Lavoie*, 787 So.2d 245 (Fla. 2d DCA 2001) was dispositive of the issues in this dispute. (P. 21a-23a). *See* Argument 1, supra.

After entry of the Circuit Court judgment against Petitioner, she availed herself of the ample opportunities afforded any Appellant in the District Court in presenting arguments and obtaining a fair hearing.

She filed an Initial Brief, a Reply Brief, and requested and appeared for oral argument. She then raised her arguments again in her motion for rehearing and request for a written opinion. The District Court carefully and thoroughly considered the issues raised by Petitioner. There is nothing in Petitioner's arguments that in any way suggests that the decision-making process is different in cases with *per curiam* affirmed opinions as opposed to written opinions. Hence, Petitioner's argument that she was denied a fair hearing and therefore, was denied due process because she received a *per curiam* affirmance is without merit. (P. 24).

Petitioner next argued that the Florida constitutional provision which does not permit review by the Florida Supreme Court where the intermediate appellate court fails to issue an opinion is an unconstitutional denial of access to the Courts. (P. 25-26). Florida's appellate system does not deny meaningful access to the Courts. Like most state appellate court systems, Florida's system has two tiers, five intermediate District Courts of Appeal and the Florida Supreme Court. Like most states, every litigant is entitled to one appeal as a matter of right, but the next tier of review is discretionary. The District Courts are designed to correct error for individual litigants in virtually all cases. Any litigant can invoke appellate jurisdiction for a good reason, a bad reason, or no reason at all. Review after that is done for the purposes of law development, for the benefit of the community at large, as opposed to individuals. In

Florida, the District Courts can certify questions of great public importance to the Florida Supreme Court, a procedure used with regularity. The Florida Supreme Court rarely declines to review a decision certified by a District Court.

In short, the Florida appellate system has procedures in place to ensure that all litigants have an avenue of appellate review, and that the Florida Supreme Court has the opportunity to exercise its discretion and decide cases of public interest, novel questions, undecided points of law, and to maintain uniformity in the law by resolving conflicting appellate opinions. All litigants, whether represented by an attorney or proceeding pro se, are afforded equal access to the courts without financial barriers. *Lingle v. Dion*, 776 So.2d 1073 (Fla. 4th DCA 2001). The argument that the constitution deprives litigants of fair access to the Courts is without merit.

Third, Petitioner argued that *per curiam* decisions without written opinion denied equal protection of the laws by creating two disparate classes of litigants without any legitimate reason for doing so: those who receive written opinions enabling them to seek further appellate review, and those who don't, depriving them of further appellate review. (P. 26-27). This argument is fatally flawed. All litigants are entitled to an appeal as a matter of right. All appeals to the District Courts receive earnest, intelligent, fearless consideration and decision, thus assuring justice to all. Further review is discretionary and to

obtain it, explicit criteria must be met. There is no denial of equal protection when the same terms of appeal are open to all.

Even if the argument that Florida's *per curiam* decision-making creates a discriminatory classification is considered, it is clear that it does not implicate any suspect class, such as race, religion, sex or national origin. Hence, so long as it has a rational justification or reasonable relationship to the achievement of a legitimate government purpose, it is permissible. The requirement of rationality is met as *per curiam* decisions satisfy the judicial system's interest in not issuing written opinions where to do so would have no public value as precedent, would cause unnecessary case law on well-settled issues of state law, and would engender duplicative opinions.

Finally, Petitioner argued that substantive due process was violated by the use of *per curiam* decisions which was asserted to be arbitrary and oppressive. (P. 27-28). Just as in the "equal protection" argument, no fundamental right is alleged to be at stake, and therefore the standard for evaluating a substantive due process challenge is under the rational basis test. Florida's appellate system has a rational relationship to the governmental interest in not issuing written opinions where no public value would be served, avoiding unnecessary case law on well-settled issues of state law, and avoiding duplicative opinions. There are several pathways available to Florida appellate litigants. All litigants have

the same access to the District Courts of Appeal. Even in the absence of a written opinion, the 2003 amendment to Fla. R. App. P. 9.330(a) created an alternative pathway to obtain Florida Supreme Court review. Florida's appellate rules also authorize a litigant to request the District Court to certify questions of great public importance to the Florida Supreme Court. Where cases raise important federal concerns arising from the Constitution, this Court has the ability to review those cases, even in the absence of a written opinion. Therefore, substantive due process was not violated.

CONCLUSION

The ruling by the Circuit Court applied the dispositive state law precedent to the undisputed material facts and came to the correct conclusion. The District Court affirmed the Circuit Court as the points of law raised by Petitioner were well-settled by the appellate courts in the State of Florida. This case does not present an important question of federal law unsettled by this Court or one in conflict with applicable decisions of this Court, or a case otherwise calling for the supervision of the Supreme Court of the United States. For all of the reasons discussed herein, Petitioner has failed to show that the District

Court's decision is worthy of review by this Court. The Petition should be denied.

Respectfully submitted,

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